No. 49264-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ARNOLD CRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

This Court should reverse Mr. Cruz's exceptional sentence and remand for resentencing because the plain language of RCW 9.94A.535(2)(c) did not permit the trial court to impose consecutive sentences.

A jury convicted Arnold Cruz of rendering criminal assistance in the first degree and removal or concealment of a deceased body, which is a gross misdemeanor. CP 23. Separately, Mr. Cruz pled guilty to felony possession and bail jumping charges. CP 13. He was sentenced on both cause numbers together. CP 5-8. Because he was sentenced on all three felony counts at the same time, his offender score was increased from an eight to a ten on the rendering criminal assistance conviction.[1] RP 5; CP 24. The trial court imposed consecutive sentences under RCW 9.94A.535(2)(c), which allows a court to impose an exceptional sentence where a "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

[1] As Mr. Cruz explained in his opening brief in cause number 49284-9, the rendering criminal assistance conviction should be reversed because the information is constitutionally deficient. If this Court reverses his rendering criminal assistance conviction in 49284-9, Mr. Cruz's offender score in this matter would be reduced to a 9. *See* RCW 9.94A.525(1) (only "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589").

The trial court erred when it determined that the requirements of RCW 9.94A.535(2)(c) had been satisfied because only *one* offense – rather than "some" offenses – went unpunished when Mr. Cruz's offender score increased from an eight to a ten on the rendering charge. As Mr. Cruz explained in his opening brief, the plain language of RCW 9.94A.535(2)(c) demonstrates the legislature did not intend for a trial court to impose an exceptional sentence when only one conviction will go unpunished. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent").

Contrary to the State's suggestion, de novo review is appropriate here. *See State v. Feely*, 192 Wn. App. 751, 770, 368 P.3d 514 (2016) (when the reasons supplied by the sentencing judge do not justify a departure from the standard range, this Court applies a de novo standard).

a. <u>The State fails to address the language of the statute; furthermore, to the extent the language is ambiguous, the rule of lenity applies</u>.

In its response the State ignores the plain language of the provision and disregards the well-settled canons of statutory

construction discussed in Mr. Cruz's opening brief. Instead, it points to a 2005 session law stating that the legislature's intent in amending and enacting numerous subsections of the SRA was only to comply with case law regarding the right to jury findings on facts that increase punishment. *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Laws 2005, ch. 68, § 1. The State claims that case law construing a common-law precursor to this provision therefore controls. *See State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993).

The State is wrong, for at least two reasons. First, the Supreme Court subsequently overruled *Smith* and described it as holding that, before the statute at issue here existed, a court could determine as a factual matter that "allowing a current offense to go unpunished is clearly too lenient[.]" *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005). *Smith* was overruled because such findings must be made by a jury. *Id; accord State v. Alvarado*, 164 Wn.2d 556, 564 & n.2, 192 P.3d 345 (2008). Whatever *Smith* held with respect to a "clearly too lenient" finding is therefore inapplicable to the statute at issue here, because that language is not part of the provision. If the legislature had wanted to include it, it would have done so and would have moved it to

the next section listing aggravating factors that may be found by a jury. *See* RCW 9.94A.535(3).

Second, a plain language analysis, aided by principles of statutory construction, controls over any external statement of intent. *See State v. Reis*, 183 Wn. 2d 197, 212, 351 P.3d 127 (2015) ("legislative intent ... does not trump the plain language of the statute"). Courts have addressed different arguments regarding the provision at issue here by resorting to the usual plain-language principles of statutory construction on which Mr. Cruz relies. In *Alvarado*, for instance, the court addressed an argument regarding the meaning of the word "unpunished" under RCW 9.94A.535(2)(c) by invoking the plain-meaning rule, including consideration of related provisions and dictionary definitions. *Alvarado*, 164 Wn.2d at 561-63. And in *State v. France*, this Court addressed an argument that RCW 9.94A.535(2)(c) permitted only six, rather than nine, of his convictions to be run consecutively. *State v. France*, 176 Wn. App. 463, 469-71, 308 P.3d 812 (2013). This Court applied the plain language rule and concluded that because the legislature could have, but did not, use language consistent with the defendant's position, the defendant's arguments failed. *Id.* at 470.

The same principles must be applied here. The plain language permits an exceptional sentence only where "*some of*" the current offenses would otherwise go unpunished. RCW 9.94A.535(2)(c). The legislature could have, but did not, say an exceptional sentence is available where "one or more" current offenses go unpunished. The legislature used such language in several other provisions, indicating it "knew how to say it" when that is what it meant. *State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013). As in *Alvarado* and *France*, the meaning of this provision is dictated by the plain language. It does not permit an exceptional sentence where only one offense fails to increase the potential punishment.

Finally, even if the Court were to find the language of RCW 9.94A.535(2)(c) is susceptible to more than one reasonable interpretation, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Mr. Cruz. *State v. Weatherwax*, 188 Wn. 2d 139, 155, 392 P.3d 1054 (2017); *Conover*, 183 Wn.2d at 712. The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties. *Weatherwax*, 188 Wn.2d at 155. Under the rule of lenity, RCW

9.94A.535(2)(c) must be construed so as to require that more than one offense will go unpunished before permitting the trial court to impose an exceptional sentence.

b. This Court should reverse and remand for resentencing.

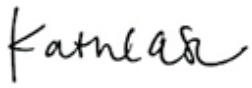
Reversal is required where an exceptional sentence is not legally justified by the aggravating factor. *State v. Davis*, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Here, the trial court improperly interchanged the word "some" with "one." This Court should reverse and remand for resentencing because the trial court was wrong to impose consecutive sentences under RCW 9.94A.535(2)(c) where the record is clear that only one charge, rather than "some of" the charges, failed to increase Mr. Cruz's sentence.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse and remand for resentencing.

DATED this 30th day of June, 2017.

Respectfully submitted,



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ARNOLD CRUZ,	)	
	)	
Appellant.	)	

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Appellate Court Case Title:	State of Washington, Respondent v. Arnold M. Cruz, Appellant
Superior Court Case Number:	15-1-00436-9

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